91-1457

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BERNIE PIOTROWSKI, AMERICAN NATIONAL BANK AND TRUST COMPANY, STEVE MARTELL, PAXTON LANDFILL CORPORATION, and STRYKER INTERNATIONAL INCORPORATED,

Petitioners,

v.

CITY OF CHICAGO, a Municipal Corporation,

Respondent.

Petition For Writ Of Certiorari To The Appellate Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether an Illinois state court erroneously held that an adequately-pled defense of unconstitutional selective prosecution is ***unavailable*** as a matter of law in a municipal enforcement action that will permanently shut down a long-established Cook County landfill, leaving two other similarly-situated landfills, located nearby, free to operate?

II. Whether, in a municipal enforcement action, a state law principle by which a state court summarily dismissed a well-pled constitutional defense of selective prosecution as "not relevant," is adequate to dispose of the defense in the face of the immediate shutdown of a Cook County landfill, and the irreparable harm, that will result from that dismissal?

III. Whether a municipal ordinance may be unconstitutionally and irreparably enforced by an instrument of the State of Illinois, leaving all legal redress to a subsequent lawsuit for damages against the agent of the State?

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the above caption. Pursuant to S. Ct. R. 29.1, the petitioners state that Paxton Landfill Corporation is a wholly owned subsidiary of Stryker International Incorporated; Stryker International Incorporated has no publicly owned parents, subsidiaries, or affiliates.

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Petition For Writ Of Certiorari To The Appellate Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

The petitioners, Bernie Piotrowski, et al. (hereinafter "Paxton"), respectfully pray that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois, First District. The questions presented are purely legal ones. Because the decision of the Illinois Appellate Court represents plain constitutional error, this case is appropriate for summary disposition on the merits pursuant to S. Ct. R. 16.1.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, First District, is reported at 215 Ill. App. 3d 829, 576 N.E.2d 64 (1991). The opinion is reprinted in the appendix to this petition. (A. 1-9.)

JURISDICTION

The Illinois Supreme Court denied the petitioners' Petition for Leave to Appeal on December 4, 1991. (A. 10.) No petition for reconsideration was filed. Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, amend. XIV, § 1.[1]

Ill. Rev. Stat., ch. 110, ¶ 2-615.

Ill. Rev. Stat., ch. 110, ¶ 2-616.

[1] See Appendix for full text of provisions involved.

STATEMENT OF THE CASE

In October of 1987, the City of Chicago (hereinafter the "City") brought an enforcement action in the Circuit Court of Cook County, Illinois, against the petitioners (hereinafter "Paxton") for operating a landfill without a City permit. In response, Paxton asserted a number of affirmative defenses, including denial of equal protection by selective prosecution in bringing this very action *against Paxton alone* even though two other similarly-situated landfills within the City (Waste Management, Inc., and Land & Lakes, Inc.) have been intentionally left free to conduct business without permits and while in violation of the express terms of the variances they need to obtain lawful permits under the City's ordinances. (R. 2737-38; 3d Amend. Ans. at 20-21.)

In October of 1988, the City moved to dismiss Paxton's affirmative defenses pursuant to Ill. Rev. Stat., ch. 110, ¶2-615 (hereinafter the "motion to dismiss") on the grounds that, ***as a matter of law,*** Paxton's affirmative constitutional defenses were ***unavailable*** though adequately pled to state the elements of a defense of selective prosecution in violation of the equal protection guarantees of the Fourteenth Amendment. (R. 233-43; City's Mot. to Dis.) In a memorandum opinion, Circuit Court Judge Burr refused to dismiss Paxton's constitutionally-based affirmative defenses, stating that "the Defendants have ***adequately articulated*** affirmative defenses of due process and of equal protection violations by the City." (A-21, emphasis added.) In so ruling, Judge Burr cited the extensive allegations in Paxton's pleadings documenting intentional discriminatory prosecution to which the City was subjecting Paxton in this and other actions. According to

Illinois law, all allegations must be accepted as true in deciding the motion to dismiss.[2] ***No Illinois court has held that Judge Burr erred in so ruling or that Paxton has not adequately alleged intentional discriminatory prosecution by the City in violation of the equal protection guarantees of the United States Constitution.***

Shortly after Judge Burr issued his opinion holding Paxton's affirmative defenses legally adequate, Judge Burr was transferred and the action was transferred to Circuit Court Judge Nowicki. Immediately after the transfer, the City moved once again to dismiss the defenses that Judge Burr had just found adequate and available. (R. 2932; Order of J. Nowicki Aug. 30, 1989.) Judge Nowicki granted the City's renewed motion and dismissed Paxton's due process and equal protection defenses as "insufficient," meaning ***unavailable*** as a matter of law.[3] (A. 33.)

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[2] *See Brown v. Tenney*, 125 Ill. 2d 348, 352, 532 N.E.2d 230, 233 (1988) (In deciding a motion under ¶ 2-615, "all properly pleaded facts must be taken as true.").

[3] In fact, the City explained to Judge Nowicki that the basis for its motion was that, *accepting the allegations as true and adequate to state claims for selective prosecution and unconstitutional denial*, the claims were nevertheless *unavailable* as defenses to the enforcement action. (A. 38-39.) For example, the City told Judge Nowicki:

> [City counsel] Henderson: [In his memorandum opinion denying the City's 2-615 motions before him, Judge Burr] said they [defendants' equal protection and due process claims] have set forth the elements that constitute a due process and equal protection claim. The issue [here, before Judge Nowicki] of whether that is an adequate defense as a matter of law was not addressed in [Judge Burr's] opinion. . . .
>
> . . . .
>
> The Court: No matter how well pled, you don't think they [the defendants] should [be able to raise it [the defenses]?
>
> Mr. Henderson: No. [Agreeing with the court.]

(Footnote continued on following page)

Judge Nowicki reached this result even though she found that: (1) the extensive factual allegations establishing selective prosecution by the City in the pleadings were "devastating" and worthy of immediate attention; and (2) granting the shutdown order that the City requested would cause irreparable harm to Paxton. (A. 41-42.) Indeed, it was for these reasons that Judge Nowicki stayed her immediate shutdown order pending Paxton's appeal in the Illinois appellate system. (A. 34-35, 41-42.)

Paxton appealed to the Appellate Court of Illinois on the basis that Judge Nowicki's holding was in violation of federal and state constitutional guarantees. That court affirmed the Cook County Circuit Court, on June 4, 1991. (A. 1-9.) The appellate court's opinion did not challenge the adequacy of Paxton's selective prosecution claims but instead summarily dismissed that defense as "not relevant," without citation to any authority for the proposition. (A. 7.) The court relied solely upon a novel state law principle of exhaustion of administrative remedies that had never been addressed by either party in either the circuit court or the appellate court. In this regard, the appellate court held that Paxton should "fully vent" its selective prosecution claim in a separate, later-filed administrative review action brought by Paxton against the City administrative body that has repeatedly denied to Paxton (four

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[3] *continued*

Id. (*See also*, City's Mot. for Sum. Judgment: "*There is no defense* ***available*** to defendants [sic] continued operation in violation of valid City ordinances." (Emphasis added.).) Accordingly, Judge Nowicki's order clarified that, as the City had asked, the issue she was deciding was *not* whether the claims were *adequate* to establish denial of equal protection or due process, but whether the claims were *available* as defenses to an enforcement action even assuming they adequately established denial of equal protection and due process. (A. 32-36.)

years before as well) the zoning variance required to seek a City operating permit. (A. 7.) The court so held even though Paxton's inability to assert its constitutional defense in the present action would result in a permanent shutdown order that would cause Paxton judicially-determined irreparable harm ***before*** having a chance to "fully vent" its selective prosecution claim. (A. 9, 34-35, 41-42.)

In a special concurrence (which reads more like a dissent), appellate Justice Coccia found the City's conduct toward Paxton, as detailed in the factual allegations of Paxton's affirmative constitutional defenses (which ***cannot be at issue here under a motion to dismiss***), sufficiently "suspect" that, "at the very least," the court should stay the injunction putting Paxton out of business until resolution of Paxton's selective prosecution constitutional claim. (A. 9.)

On August 13, 1991, Paxton filed a Petition for Appeal as a Matter of Right and, in the Alternative, for Leave to Appeal with the Supreme Court of the State of Illinois. The City responded to Paxton's Petition by attempting to interject evidentiary matter outside of the record and beyond the pleadings. Paxton moved the Illinois Supreme Court to strike all such extraneous evidentiary matter from the City's response as not properly before the Court:

> Not only is the City's attack on the factual sufficiency of Paxton's claims procedurally improper, outside the record, and factually incorrect, that attack itself proves that the City cannot justify the Appellate Court's ruling that a selective prosecution claim is no defense to an enforcement action. Rather than even attempt to justify the critical and fundamental deprivation of Paxton's civil and constitutional rights by the Appellate Court below, the City sidesteps the plain error by trying to argue alleged facts not in

the record, not accepted by any court below, and incorrect in any event.

(A. 15.) Illinois Supreme Court Justice Freeman heard argument on the motion, and granted it on October 1, 1991.[4] (A. 11.)

On December 4, 1991, the Supreme Court of Illinois denied Paxton's Petition for Appeal, without opinion. (A. 10.) On December 24, 1991, Paxton filed a motion with the Illinois Supreme Court seeking a stay of the mandate in the case pending review by this Court of Paxton's Petition for Writ of Certiorari. Justice Freeman granted that motion on December 31, 1991. (A. 16-17.) Thus, the Circuit Court of Cook County's injunction requiring immediate, irreparable shutdown of the Paxton landfill is stayed pending this Court's disposition of this Petition.

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[4] Paxton's opposition to the extra-record material which the City attempted to incorporate in its opposition to Paxton's Petition for Appeal, was based on the belief that such material would distract the Court from the real question at issue: the ***availability*** of a well-pled constitutional defense of selective prosecution. Paxton would welcome, however, full development of the selective prosecution facts before this or any Court. The available facts will show, even more graphically now than at the time Paxton first pled its selective prosecution defense, that the City has deliberately singled Paxton out for prosecution when the other landfills in Chicago continue to operate even though, as stated on the record by attorneys for the City, they have no lawful permits to do so. Not only has the City stood by and allowed these other parties to operate in violation of the same ordinances under which the City has prosecuted Paxton, the City has actively cooperated in *ultra vires* acts by the administrative bodies that have made it possible for these other landfills to continue to operate. As explained *infra*, the proper place for this kind of record development to take place is the trial court at a hearing on the merits of Paxton's selective prosecution defense. The City seeks to prevent such a hearing from ever taking place.

REASONS FOR GRANTING THE WRIT

I.

DISMISSAL OF A DISCRIMINATORY PROSECUTION DEFENSE IS DIRECTLY CONTRARY TO THE DECISIONS OF THIS COURT, THE CIRCUITS, AND OTHER STATE COURTS.

In stating that an affirmative defense of selective prosecution is "not relevant" in a municipal enforcement action, the Illinois appellate court reached a decision that is contrary to an overwhelming weight of constitutional authority. This decision means that state officials at any level of government may use the countless facially valid statutes, ordinances, and regulations at their disposal against any individual or business to further official discriminatory purposes. Without constitutional protection against discriminatory enforcement, the targeted individual or business could simply be crushed beyond recovery before having a chance to assert the invalidity of the prosecution. This is not only against the decisions of this and countless other courts, it is undebatably ***wrong***.

There is but a single question of *law* at issue in this case—whether an affirmative defense of unconstitutionally selective prosecution is ***available*** in response to an enforcement action by the City of Chicago. Paxton is not before this Court to argue whether the conduct of the City has violated Paxton's rights under the United States constitution. Judge Burr in the Circuit Court held that Paxton had adequately stated the elements of a traditional claim for selective prosecution. (A. 21.) No court has held otherwise. Based on the procedural posture from which this case arose (dismissal of the defense for being unavailable as "not relevant"), the very selective prosecution claim

upon which Judge Burr rested his holding must be taken as true and adequate *as a matter of law*. As the Illinois Supreme Court recognized and ruled, any arguments on the adequacy of Paxton's allegations to state a claim for selective prosecution, and any arguments resting on facts not before the Circuit Court, did not belong before the Illinois Supreme Court or, therefore, before this Court. (A. 11-15.) Indeed, as all courts below recognized, the sole issue is the ***availability*** of selective prosecution as a constitutional defense to an enforcement action. (A. 1-15, 33-35, 41-42.)[5]

For example, the Illinois appellate court's holding that an affirmative defense of selective prosecution is "not relevant," was no more than a conclusion that unconstitutionally selective prosecution is ***not*** available as a defense under Illinois law. (A. 7.) Justice Coccia's concurrence emphasized that conclusion. By granting Paxton's motion to strike and then denying Paxton's Petition for Leave to Appeal, the Illinois Supreme Court effectively affirmed that decision. (A. 9.)

The Fourteenth Amendment to the United States constitution provides that no State shall "deny to any person . . . the equal protection of the law." U.S. Const.

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[5] Even if the factual allegations in Paxton's pleaded affirmative defenses were attacked as inadequate to state a constitutional defense of selective prosecution, under governing Illinois procedural law, the only proper procedure would be to first brief the alleged deficiency in the state Circuit Court and, if deemed a deficiency in fact, permit Paxton to *amend* its pleadings to assert any additional allegations deemed necessary. *Knox College v. Celotex Corp.*, 88 Ill.2d 407, 422, 430 N.E.2d 976, 983 (1981) (The purpose of a motion to dismiss is to give notice of an alleged defect and an opportunity to cure the defect by amendment.); Ill. Rev. Stat., ch. 110, ¶¶2-615(d), 2-616(c). See also, note 3 *supra*. Since there has been no judicial determination of such a defect remaining in the defenses and the sole issue below was the availability of the defense, Paxton's selective prosecution defense stands adequately alleged before this Court.

amend. XIV, § 1. This Court has long held that the Fourteenth Amendment extends both to laws *facially* discriminatory as well as to unequal *application* of the law. This Court long ago established that allegations of discriminatory prosecution, conducted "with an evil eye and an unequal hand," constitute a *complete defense* to enforcement of otherwise valid laws or ordinances *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886).

In *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961), this Court dispelled any uncertainty over the manner in which a party may raise XIVth amendment protection. In *Two Guys*, this Court found it unnecessary to grant injunctive relief against the threat of discriminatory prosecution for violation of Sunday sales laws, because "appellant's employees *may defend against* any such proceeding that is actually prosecuted on the ground of unconstitutional discrimination." *Id.* at 588 (emphasis added). Accordingly, federal courts have consistently held that where allegations of unconstitutional discrimination are sufficiently well-pled, a party is entitled to *at least* an evidentiary hearing to prove the factual basis of the allegations. *See United States v. Oaks*, 508 F.2d 1403 (9th Cir. 1974), *cert. den.*, 426 U.S. 952 (1976) ("[T]he law in this circuit requires the district court, upon a proper offer of proof, to allow [the defendant] to present evidence, if any, that he has been singled out for discriminatory prosecution."); *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973) (in prosecution for failing to register for draft, defendant raised the discriminatory prosecution defense in motions to dismiss; the court held that allegations established *prima facie* case of discrimination, and remanded for evidence on government's motives).

The decision of the Illinois appellate court precludes a defendant who has been the victim of selective prosecution from defending on the precise ground that *Two Guys* expressly held is available: when the prosecution is the result of, and the direct *effect* of, unconstitutional discriminatory enforcement. The appellate court decision is therefore directly contrary to the holdings of this Court. By denying Paxton's Petition for Appeal, the Illinois Supreme Court has refused to address and correct this fundamental divergence of Illinois law from long-established and incontrovertible federal constitutional law.

The decision of the Illinois courts is also at odds with the law of other state jurisdictions as well. *See, e.g., Murguia v. Municipal Court for Bakersfield Judicial Dist.*, 15 Cal. 3d 286, 288, 540 P.2d 44, 46, 124 Cal. Rptr. 204, 206 (1975) ("If an individual can show that he would not have been prosecuted except for such invidious discrimination against him, a basic constitutional principle has been violated, and such a prosecution must collapse upon the sands of prejudice."); *People v. Utica Daw's Drug Co.*, 16 A.D. 2d 12, 19, 225 N.Y.S.2d 128, 135 (1962) ("A heavy burden rests on the defendant to establish conscious, intentional discrimination, but if it succeeds in sustaining that burden, the defendant will be entitled to a dismissal of the prosecution as a matter of law.").

Although the manner in which a party may invoke the protection of the Fourteenth Amendment is flexible, under the decisions of this Court, the federal courts below, and the courts of various state jurisdictions, a claim of unconstitutionally discriminatory prosecution constitutes a legally complete defense to a government enforcement action. For the Illinois courts to hold otherwise is a serious and undeniable mistake of federal constitutional law.

II.

THE DECISION OF THE ILLINOIS COURTS SEVERELY UNDERMINES THE ESSENTIAL PROTECTIONS OF THE XIVth AMENDMENT.

This Court has long recognized that the Fourteenth Amendment provides protection against not only laws that are *facially* unjust, but also those that are *applied* in a discriminatory manner:

> The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against *intentional and arbitrary discrimination*, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.

Sunday Lake Iron Co. v. Wakefield, 247 U.S. 350, 352 (1918).

In denying the ***availability*** of the defense of selective prosecution, the Illinois courts have created a breach in the protection afforded by the Fourteenth Amendment. (A. 1-15, 33-35, 41-42.) This is a constitutional breach through which officials of the state, spurred by an invidious motivation, may rush in seeking to deny citizens essential guarantees of protection. The damage here is also not necessarily limited to Illinois. If allowed to stand uncorrected, the appellate court opinion is available as authority for the proposition that constitutional claims cannot be raised as a defense to prosecution. Although obviously not binding in other jurisdictions, decisions of this sort provide a dangerous precedent that threatens constitutional rights.

In the trial court, the City repeatedly and consistently argued that the only fact that mattered was Paxton's lack

of an operating permit.[6] According to the City, the circumstances surrounding Paxton's failure to obtain the necessary permits (after years of being properly permitted) and the City's allegedly unconstitutional selection of Paxton for enforcement, were immaterial. Circuit Judge Burr rejected the City's arguments (A. 21); but on transfer of the case to Circuit Judge Nowicki, she accepted them and struck Paxton's affirmative defenses as unavailable as a matter of law. (A. 33-35, 38-39, 41-42.) She so ruled even though she found the facts alleged in those defenses "devastating" and worthy of immediate attention. (A. 34-35, 41-42.) Likewise in the appellate court, Justice Coccia found the City's conduct toward Paxton sufficiently "suspect" that Paxton's constitutional claims should be heard *before* irreparably putting Paxton out of business. (A. 9, 34-35, 41-42.)

Thus, despite what the courts below have accepted as an adequate allegation of a selective prosecution defense, the City has succeeded in placing an established, viable business in imminent and irreparable danger of permanent shut down ***without*** receiving ***any*** hearing on the ***merits*** of that defense. Once this situation receives the stamp of judicial sanction, then the danger exists that other citizens will suffer at the hands of officials eager to exploit this breach in fundamental constitutional protection. The courts will also find themselves in the untenable position of lending official sanction to acts of the executive against which it is the court's role to protect the citizenry. Now, any victim of state prosecution founded on an intentionally discriminatory animus cannot count on asserting the Fourteenth Amendment's protection as a defense. This result is clearly ***wrong*** and significantly erodes basic constitutional guarantees.

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[6] See note 3 *supra* and accompanying text.

III.

THE DECISION OF THE COURT BELOW IS INADEQUATE BECAUSE IT IGNORED AND DID NOT DISPOSE OF PAXTON'S CONSTITUTIONAL CLAIMS.

Judge Nowicki stayed the injunction enjoining Paxton from operating without a permit in part because of the "self-evident" harm to Paxton and its employees and Paxton's "devastating" factual allegations. (A. 34-35, 41-42.) The court of appeals held that Paxton's constitutional claim of selective prosecution was "not relevant in these proceedings" and thus unavailable as a matter of law. (A. 7.) On this latter point, however, Justice Coccia in fact dissented, stating that he found Paxton's factual allegations "sufficiently suspect" that he would have stayed the injunction "until the resolution of all pending litigation, including the administrative review proceedings." (A. 9.) The Illinois Supreme Court likewise recognized the irreparable harm to Paxton and granted Paxton's motion to stay the injunction pending this appeal. (A. 16-17.) In this regard, therefore, the courts below have consistently held that Paxton will suffer irreparable harm by their decisions regardless of whether Paxton's constitutional claim is heard in another proceeding. In effect, the Illinois courts have said that it is more important to selectively and irreparably enjoin Paxton from operating without a permit now, than it is to grant any hearing on the merits whatsoever for Paxton's constitutional claims.

As Justice Holmes stated, "It is a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the [constitutional] rights [of the claimant]." *Rogers v. Alabama*, 192 U.S. 226 (1904) (defendant indicted for murder claimed denial of equal protection of the laws

guaranteed by the Fourteenth Amendment because of racial disparity in grand jury selection). *See also, Broad River Power Co. v. South Carolina*, 281 U.S. 537 (1930) ("Even though the constitutional protection invoked be denied on nonfederal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis.").

The record in this case clearly shows that the decision of the appellate court is not adequate to address the federal issues presented. If Paxton is enjoined, it is indisputable, and indeed judicially determined below, that Paxton will suffer irreparable harm without ever having received the benefit of a hearing on the merits of its constitutional claim. (A. 9, 34-35, 41-42.) Paxton's situation is no different than that of a victim of civil rights abuse who claims an affirmative constitutional defense to an ordinance enforcement action and, after the court strikes the defense as "unavailable as a matter of law," is told to continue to suffer the discriminatory injury and have his or her constitutionally guaranteed defense heard elsewhere. *Cf. Staub v. City of Baxley*, 355 U.S 313 (1958) (defendant did not deny violation of ordinance but alleged constitutional defense against validity of the statute; non-federal basis for decision held inadequate).

Irrespective of the adjudicated irreparable harm Paxton will suffer, the appellate court decision is inadequate because irreparable harm is presumed whenever a fundamental constitutional right is denied. *Cate v. Oldham*, 707 F.2d 1176, 1188-89 (11th Cir. 1983). *But see, Northeastern Florida Chapter of Ass'n of General Contractors v. Jacksonville*, 896 F.2d 1283 (11th Cir. 1990). Judge Burr found that "the Defendants have *adequately articulated* affirmative defenses of due process and of equal protection violations by the City." (A. 21, emphasis added.) ***No court of***

review has ever held that Judge Burr erred in so finding. Indeed, Justice Coccia in effect agreed, and the Illinois Supreme Court acknowledged as much in striking portions of the city's brief for going beyond the pleadings and beyond the issue of the availability of a well-pled selective prosecution defense. (A. 9, 11-15.)

"A purported state ground is not independent and adequate . . . where the state law . . . throws such obstacles in the way of enforcement of federal rights that it must be struck down as unreasonably interfering with the vindication of such rights." *Williams v. Georgia*, 349 U.S. 375 (1955) (J. Clark, dissenting). The decision of the appellate court is inadequate because it denies Paxton's fundamental right to its constitutional guarantee of freedom from unequal protection.

The appellate court's decision is further inadequate because the courts themselves should not lend their hands to any action that intentionally deprives a party's constitutional rights. *See Utica Daw's Drug Co.*, 16 A.D.2d at 16, 225 N.Y.S.2d at 132 ("the court should quash the prosecution . . . because the court . . . should not lend itself to a prosecution which would violate the constitutional rights of the defendant."). This lawsuit is *itself* a part and parcel of the selective prosecution of which Paxton complains. Because this petition comes to the Court solely on the pleadings and the limited question presented, refusal by this Court to review the decision below will only exacerbate the error and Paxton's unconstitutional injury. A court of equity must, at all costs, avoid the appearance of providing assistance to a party who seeks to deny the guaranteed protection of the Constitution.

As noted above, the state court's rulings here throw completely novel procedural requirements before a party seeking to assert a selective prosecution defense in of-

fensive government enforcement action. However: "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 457 (1958).

Exhaustive research has revealed no federal or Illinois case, and indeed no case in any jurisdiction, in which the claim of selective prosecution has been found unavailable as a matter of law because the defendant failed to exhaust his administrative remedies. On the contrary, a claim of unequal protection in the form of selective prosecution is ***always*** available in an enforcement action. *See, e.g., Wayte v. United States*, 470 U.S. 598 (1985). "[T]he decision to prosecute may not be 'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification'." *Id.*, at 608 *quoting Bordenkircher*, 434 U.S. at 364.

Once this Court determines that Paxton's constitutional defense *is available* as a matter of law, the judgment of the appellate court must be reversed. Indeed, if on remand the appellate court were to apply the proper constitutional principles, the result would be the exact *opposite* and the petitioners' selective prosecution defense would have to be considered on its merits. As cautioned under *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945), *overruled in part on other grounds, Michigan v. Long*, 463 U.S. 1032 (1983), the Court's opinion will not be "merely advisory," and "the same judgment [will not] be rendered by the state court after [this Court has] corrected [the state court's] views of federal law."

Review is eminently appropriate, as the state court's decision was not adequate to resolve or avoid the federal constitutional issues in this case.

CONCLUSION

For the reasons stated above, this Court should grant a writ of certiorari. Furthermore, the plain legal error of the Illinois courts is so apparent that this Court should grant summary disposition on the merits, reversing the Illinois courts and remanding the case back to the trial level for a hearing on Paxton's selective prosecution defense.

Respectfully submitted,

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APPENDIX

[Appellate Court of Illinois]

Second Division
June 4, 1991

1-89-3266)
1-89-3357) CONS.

CITY OF CHICAGO, A Municipal Corporation,	)	
	)	Appeal from the Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	Honorable
BERNIE PIOTROWSKI, et al.,	)	Julia M. Nowicki
	)	Judge Presiding.
Defendants-Appellants.	)	

JUSTICE DIVITO delivered the opinion of the court:

Plaintiff City of Chicago (the City) filed an ordinance enforcement action in the circuit court of Cook County against the Paxton landfill and other defendants (collectively, Paxton) for operating the Paxton landfill without a permit. The circuit court granted the City's motion to dismiss Paxton's affirmative defenses and enjoined Paxton from continuing to operate without a permit. Paxton appeals, presenting as issues whether (1) the circuit court erred in granting the City's motion to dismiss Paxton's affirmative defenses after that motion had been denied by another judge; (2) the circuit court erred in dismissing Paxton's affirmative defenses of selective prosecution and of discrimination in denying Paxton a permit, in violation of Federal and State guarantees of equal protection and due process; and (3) the circuit court erred in enjoining Paxton from operating its landfill without a permit.

The Paxton sanitary landfill is located at 11601 South Stony Island Avenue in Chicago. Located immediately ad-

jacent to the Paxton site are landfills which are operated by Waste Management, Inc. (Waste Management) and Land and Lakes, Inc. (Land and Lakes). Since at least 1979, these three have been the only properly zoned, non-hazardous, non-toxic operators of sanitary landfills permitted in Chicago. The area of their operation has been zoned an "M3-3 Heavy Manufacturing District" by the City; thus requiring a special use variance for their operation.

The City has established a two-tiered process for the licensing of landfills. First, an applicant must apply to the Zoning Board of Appeals (ZBA) for a special use variance. Then, if the variance is granted, the applicant may apply to the Department of Consumer Services for a permit. Once a permit is issued, the Department regularly inspects the site to ensure compliance with environmental standards.

In 1983, Paxton applied for renewal of its variance and permit. Prior to that time, Land and Lakes and Waste Management were also required to renew their respective variances and permits. On October 15, 1982, the ZBA approved Land and Lakes' application for a special use variance and, on August 20, 1982, the ZBA approved Waste Management's application. The ZBA stated that it would review Land and Lakes' use again in October 1985 and every 24 months thereafter, and that it would review Waste Management's use in August 1989 and every 36 months thereafter.

Following a hearing before the ZBA on February 24, 1984, Paxton's application for a variance was denied. The ZBA found that,

> "(the landfill) will be unsuitable for future manufacturing uses; that the applicant and its related entities has a history with respect to the conduct and opera-

> tion of landfills which has indicated disregard for environmental concerns; that the applicant and its related entities have shown such disregard for environmental laws and regulations in this and other jurisdictions that there can be no assurance that the public health, safety and welfare will be protected at this site * * *."

Paxton's suit for administrative review of the ZBA's decision resulted in summary judgment in its favor. This court reversed, however, because of Paxton's failure to comply with the service requirements of the Administrative Review Act (Ill. Rev. Stat. 1983, ch. 110, par. 3-103). *American National Bank and Trust Co. v. City of Chicago* (1985), 132 Ill. App. 3d 570, 478 N.E.2d 1, *leave to appeal denied*, 108 Ill. 2d 555.

Subsequently, Paxton brought suit in Federal court, alleging that its constitutional rights were denied by the City and the ZBA. The district court dismissed the action, holding that this court's dismissal constituted a decision on the merits and therefore the action was barred by *res judicata*. (*American National Bank and Trust Co. v. City of Chicago* (N.D. Ill. 1986), 636 F. Supp. 374.) The Seventh Circuit affirmed that decision, and the United States Supreme Court denied Paxton's petition for *certiorari*. (*American National Bank and Trust Co. v. City of Chicago* (7th Cir. 1987), 826 F. 2d 1547, *cert. denied* (1987), 484 U.S. 977, 98 L. Ed. 2d 487, 108 S. Ct. 489.) Despite its failure to obtain proper zoning and the required permit, Paxton continued to operate the landfill.

In February 1984, while Paxton's suit for administrative review in this case was pending, the Chicago City Council passed an ordinance declaring a moratorium on the creation or expansion of sanitary landfills until February 1, 1989. In September 1987, Paxton filed a second applica-

tion seeking a variance. The ZBA denied the application without holding a hearing, citing as its basis the existing moratorium. A circuit court judge later ordered the ZBA to consider the 1987 application. On February 22, 1989, a hearing was held and the ZBA announced that it would apply a standard of proof which was "pretty close to beyond a reasonable doubt that there would be no impact on the public health, safety, and welfare." The application was then denied. Administrative review of these proceedings is currently pending in the circuit court of Cook County.

When the ZBA's earlier decision became final, the Department of Consumer Services attempted to shut down Paxton's landfill. It filed a complaint in 1987 seeking fines and an injunction to prevent Paxton from operating without a permit. In response, Paxton asserted 11 affirmative defenses.

On October 19, 1988 the City moved to dismiss Paxton's affirmative defenses pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (Ill. Rev. Stat. 1987, ch. 110 pars. 2-615, 2-619). The parties extensively briefed and argued the motions. In its July 3, 1989, memorandum opinion and order, a circuit court judge dismissed nine of Paxton's affirmative defenses, but found that two of them were satisfactorily alleged and therefore denied the City's motion to dismiss them.

After the case was reassigned to another circuit court judge, the City filed a motion for summary judgment, challenging the legal adequacy of the defenses. The parties submitted briefs and the circuit court heard arguments on the motion on November 8, 1989, treating the motion as a renewed motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (Ill. Rev. Stat.

1987. ch. 110, par. 2-615). Finding that the two affirmative defenses were insufficient, the circuit court reversed the prior judge's ruling and dismissed them. The court then granted summary judgment and entered an injunction prohibiting Paxton's further operation of the landfill, but granted a stay pending appeal. Paxton appeals from that order, asking this court to reverse the grant of summary judgment for the City and the imposition of the injunction, and to remand the case for trial or other appropriate proceedings.

I.

Paxton initially argues that the circuit court erred in revisiting issues already decided by a predecessor judge. Specifically, Paxton contends that the first order denying the City's motion to dismiss the affirmative defenses constituted the law of the case, and that the circuit court therefore improperly granted the City's motion for summary judgment. The City maintains that the first ruling was an interlocutory order subject to revision.

Illinois Supreme Court Rule 304(a) provides in pertinent part that,

> "any judgment that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to revision at any time before the entry of a judgment adjudicating all the claims, rights, and liabilities of all the parties." (107 Ill. 2d. R. 304(a).)

In denying the City's motion to dismiss, the original circuit judge found that Paxton had sufficiently alleged two affirmative defenses. The effect of this order, however, was not adjudicatory of the claims, rights, or liabilities between the parties; the controversy still existed. The

order was therefore interlocutory and subject to modification by the successor court. (*Rowe v. State Bank of Lombard* (1988), 125 Ill. 2d 203, 531 N.E. 2d 1358; *Balciunas v. Duff* (1983), 94 Ill. 2d 176, 446 N.E. 2d 242; *Towns v. Yellow Cab Co.* (1978), 73 Ill. 2d 113, 382 N.E. 2d 1217.) The circuit court's modification of the prior judge's order, therefore, did not constitute error.

II.

Paxton next contends that it was selectively prosecuted and that it was discriminated against, in violation of State and Federal guarantees of equal protection and due process. Regarding those contentions, we note that an action for administrative review is currently pending in the circuit court of Cook County.

In *Howard v. Lawton* (1961), 22 Ill. 2d 331, 175 N.E. 2d 556, the supreme court held that constitutional issues may be raised in administrative review proceedings. This appeal, however, is not from administrative review; indeed, as previously indicated, the earlier administrative review in this case resulted in an unfavorable result for Paxton. This appeal arises from an enforcement action and concerns the propriety of the grant of injunctive relief and related rulings which followed administrative review. To allow Paxton to assert constitutional issues at this stage would be contrary to the principle underlying the doctrine of exhaustion of administrative remedies.

Generally, one may not seek judicial relief from an administrative action unless he has first exhausted all administrative remedies available to him. (*Phillips v. Graham* (1981), 86 Ill. 2d 274, 427 N.E. 2d 550.) An exception to the exhaustion of remedies rule exists where a party attacks the constitutionality of a statute on its face. (*Phil-*

lips, 86 Ill. 2d at 289.) If, however, the complaint is not that the statue is unconstitutional on its face, but that it has been applied in a "discriminatory or arbitrary manner," the party must first seek relief through the administrative remedies provided. (*Phillips*, 86 Ill. 2d at 289.) There are well-established reasons for this rule: "(1) it allows full development of the facts before the agency; (2) it allows the agency an opportunity to utilize its expertise; and (3) the aggrieved party may succeed before the agency, rendering judicial review unnecessary." (*Illinois Bell Telephone Co. v. Allphin* (1975), 60 Ill. 2d 350, 358, 326 N.E. 2d 737.) The rule also allows administrative agencies to correct their own errors, clarify their policies, and reconcile conflicts before judicial relief is sought. *Smith v. Dept. of Registration and Education* (1988), 170 Ill. App. 3d 40, 523 N.E. 2d 1271, *app. den.*, 122 Ill. 2d 594.

These principles are directly applicable to the instant case. Paxton contends that it has been discriminated against, but has not exhausted its administrative remedies. Pursuant to *Howard*, Paxton's constitutional issues may be fully vented in the pending administrative review proceedings. We agree with the circuit court's conclusion that those issues were not relevant in these proceedings.

III.

The final issue is whether the circuit court erred in enjoying Paxton from operating its landfill without a permit.

Paxton contends that it was entitled to a hearing on whether its conduct posed a nuisance or threat of irreparable injury in fact. When seeking injunctive relief that is expressly provided for by statute, however, a plaintiff is not required to plead or prove the traditional elements

of irreparable harm and an inadequate remedy at law. *Sadat v. American Motors Corporation* (1984), 104 Ill. 2d 105, 470 N.E. 2d 997.

In *People v. Keeven* (1979), 68 Ill. App. 3d 91, 385 N.E. 2d 804, the court held that where a statute authorizes injunctive relief, the plaintiff need show only that there has been a violation of the statute by the defendant and that the plaintiff has standing to bring the action. It was therefore unnecessary for the City to prove irreparable damage or the absence of an adequate remedy at law. *Keeven*, 68 Ill. App. 3d at 97.

In the instant case, it was clear that Paxton's continued operation without a license was violative of the applicable ordinances. (Chicago Municipal Code, ch. 17, § 6.2 (1983); ch. 99, § 4 (1983); ch. 99, § 36.1(b) (1986).)[1] The circuit court therefore properly enjoined Paxton from operating its landfill.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

AFFIRMED.

HARTMAN, J., concurs.

COCCIA, J., specially concurring.

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[1] The Municipal Code has been recodified since 1983, but the new sections do not materially alter the old ones.

JUSTICE COCCIA, specially concurring:

I concur in the judgment of the majority in dealing with the specific issues in this appeal. However, I find the underlying factual history giving rise to the dispatch of the defendant, Paxton Landfill Corporation, sufficiently suspect that I would, at the very least, stay the enforcement of the injunction prohibiting Paxton from further operation of this landfill until the resolution of all pending litigation, including the administrative review proceedings pending in the circuit court of Cook County.

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

December 4, 1991

Mr. George P. McAndrews
McAndrews, Held & Malloy, Ltd.
500 West Madison St., 31st Fl.
Chicago, IL 60661

No. 72376—City of Chicago, etc., respondent, v. Bernie Piotrowski et al., petitioners. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for appeal as a matter of right or leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 26, 1991.

STATE OF ILLINOIS
SUPREME COURT CLERK
Supreme Court Building
Springfield 62706

October 1, 1991

Mr. George McAndrews
McAndrews, Held & Malloy, Ltd.
500 West Madison Street
Chicago, IL 60661

THE COURT HAS TODAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 72376—City of Chicago, etc., respondent, v. Bernie Piotrowski et al., petitioners.

The motion by the petitioners to strike portions of the answer to the petition for leave to appeal is *allowed.*

JH:kp

cc: Corporation Counsel Chicago

[NOTE: SEE THE MOTION GRANTED BY THIS ORDER, ON PAGE A. 12-15 INFRA.]

A. 12

No. 72376

IN THE
SUPREME COURT OF ILLINOIS

CITY OF CHICAGO, a Municipal Corporation,
Plaintiff-Respondent,

v.

BERNIE PIOTROWSKI, et al.,
Defendant-Petitioners.

On Petition for Appeal as a Matter of Right,
and in the Alternative, for Leave to
Appeal from the Appellate Court of Illinois, First District
Nos. 89-3266 and 89-3357 (Cons.)

There Heard on Appeal from the
Circuit Court of Cook County
No. CC-499-569

The Honorable JULIA M. NOWICKI, Judge Presiding

MOTION TO STRIKE THE CITY'S REFERENCES OUTSIDE OF THE RECORD

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Attorneys for Defendant-Petitioners

A. 13

No. 72376

IN THE
SUPREME COURT OF ILLINOIS

CITY OF CHICAGO, a Municipal Corporation,

Plaintiff-Respondent,

v.

BERNIE PIOTROWSKI, et al.,

Defendant-Petitioners.

On Petition for Appeal as a Matter of Right,
and in the Alternative, for Leave to
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There Heard on Appeal from the
Circuit Court of Cook County
No. CC-499-569

The Honorable JULIA M. NOWICKI, Judge Presiding

MOTION TO STRIKE THE CITY'S REFERENCES OUTSIDE OF THE RECORD

Bernie Piotrowski, et al., Defendant-Petitioners (hereinafter "Paxton") respectfully move this Court to strike the portions of the City of Chicago's Answer to Paxton's Petition that include matter outside of the Record. In support of this motion, Paxton states as follows:

1. The City in its Answer has made a blatant attempt to mischaracterize Paxton's arguments and misdirect this Court's attention from the only issues in this appeal. The City has attempted to introduce matter into this appeal which was neither before the Appellate Court nor the Circuit Court. The City has therefore included matter that is "not properly in the record" and, according to long-established decisions of this Court, should "not be considered on review." *Jenkins v. Delon Wu*, 102 Ill. 2d 468, 468 N.E.2d 1162 (1984).

2. The City once again attempts to argue to the factual *adequacy* of Paxton's constitutional defenses. These facts, as a matter of law, are not in issue in this appeal. In ruling on a §2-615 motion, "all properly pleaded facts must be taken as true." *Brown v. Tenney*, 125 Ill. 2d 348, 352, 532 N.E.2d 230, 233 (1988). The City attacks the same well-pleaded facts which Judge Nowicki has found to be "devastating," (R. 3961), that Judge Burr found *adequately supported* Paxton's claims of unconstitutional bias on the part of the City (R. 2915), and that Justice Coccia in the Appellate Court below found demonstrated conduct by the City that was "sufficiently suspect" to warrant a stay of the injunction against Paxton. (Slip Opinion at 10.)

3. On page 8 of its Answer to Paxton's Petition, the City cites to the record for the well-pleaded fact that Paxton has been treated differently from the other landfills operating in Chicago. The City further states: "Those two landfills, however, have permits." Here, however, the City fails to cite to the Record. The reason is simple—*there is no support in the Record* for such a statement, and the statement is at odds with admissions of counsel for the City in other matters. This portion of the City's Answer should "not be considered on review," *Jenkins*, and should be stricken.

4. Not only is the City's attack on the factual sufficiency of Paxton's claims procedurally improper, outside the record, and factually incorrect, that attack itself proves that the City cannot justify the Appellate Court's ruling that a selective prosecution claim is no defense in response to an enforcement action. Rather than even attempt to justify the critical and fundamental deprivation of Paxton's civil and constitutional rights by the Appellate Court below, the City sidesteps the plain error by trying to argue alleged facts not in the record, not accepted by any court below, and incorrect in any event. The City's improper argument proves the need for review by this Court.

WHEREFORE, the Defendant-Appellants respectfully request this Court to grant Defendant-Appellants' Motion to strike that portion of the City's answer which contains matter not supported by the Record.

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Attorneys for Defendant-Petitioners

STATE OF ILLINOIS
SUPREME COURT CLERK
Supreme Court Building
Springfield 62706

December 31, 1991

Mr. George P. McAndrews
McAndrews, Held & Malloy, Ltd.
500 W. Madison Street
Chicago, IL 60661

THE COURT HAS TODAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 72376—City of Chicago, etc., respondent, v. Bernie Piotrowski et al., petitioners.

The motion by the petitioners for stay of mandate pending the filing and disposition of writ of certiorari in the United States Supreme Court is *allowed.*

A copy of the order is enclosed.

JH:kp
Encl.
cc: Lynn K. Mitchell
Henry Henderson

IN THE
SUPREME COURT OF ILLINOIS

City of Chicago, etc.	)	
	)	
Respondent	)	AC1-89-3266
	)	AC1-89-3357 cons.
v.	)	
	)	
Bernie Piotrowski, et al.,	)	TRCC499569
	)	
Petitioners	)	Hon. Julia M. Nowicki
	)	Judge Presiding

ORDER

This matter has come for consideration upon the motion of the petitioners to stay the mandate of this Court pending appeal or application for *certiorari* in the United States Supreme Court.

IT IS ORDERED that the mandate of this Court in the above cause is stayed pending the filing of a notice of appeal or an application for *certiorari* or the expiration of the period within which said application or notice may be filed. If *certiorari* is applied for or notice of appeal filed, the mandate of this Court shall, upon proof of such filing being made by affidavit filed with the clerk of this Court, be further stayed pending resolution by the United States Supreme Court of such application or appeal. If no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which appeal or *certiorari* may be sought.

/s/ Charles S. Freeman
Justice,
Supreme Court of Illinois

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
MUNICIPAL DIVISION—FIRST DISTRICT

CITY OF CHICAGO, A Municipal Corporation,	)	
Plaintiff,	)	No. CC-499-569
v.	)	
BERNIE PIOTROWSKI, et al.,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

This cause comes on to be heard on Defendants', Bernie Piotrowski and Paxton Landfill Corporation (the "Defendants"), Motion for leave to substitute Corrected Third Amended Answer and Affirmative Defenses to Plaintiff, City of Chicago's Second Amended Complaint.

A statement of some of the facts alleged is essential to an understanding of the court's disposition of the pending motion.

a. The site used by Paxton Landfill Corporation ("Paxton") for its sanitary landfill operation (the "site") has been used continuously as a sanitary landfill for many years. At one time, the entire site was permitted as a sanitary landfill by both the City of Chicago ("City") and the State of Illinois.

b. Due to changes in the permit laws, it became more economical to apply for permits only for the specific area on the site that was actually going to be used, rather than

applying for permits for the whole site. The practice among all landfill operators in the City has therefore been to apply for permits for new areas only a few months prior to the time they will actually be used.

c. Before a permit may be issued, however, it is necessary for the operator to obtain a special use variance under the zoning code, Municipal Code of Chicago, ch. 194. The code only allows sanitary landfills as special uses. Municipal Code of Chicago, ch. 194A Sec. 10.4-2(10). Once the variance is obtained, it is then necessary to apply to the Commissioner of Consumer Services ("Commissioner") for a permit to operate in the areas specified in the application for a variance.

d. On June 1, 1983, as the first step in the process of obtaining a permit to operate in a new area of the site, Paxton filed an application for a special use variance with the Zoning Board of Appeals ("ZBA").

e. On June 24, 1983, the City's Department of Planning sent a letter to the ZBA stating that much of the area upon which the Paxton Landfill was sited had been dedicated to the City for streets and alleys. The Department of Planning therefore recommended that Paxton not be granted the variance. Paxton filed a declaratory judgment action in the Circuit Court of Cook County seeking to quiet title. This action was styled *American National Bank u/t/n 33832 v. City*, 83L 53087.

f. The ZBA then held a hearing on February 24, 1984 and issued an order denying Paxton the variance on the basis that the site would not be suitable for industrial use after Paxton ceased using it as a landfill and that Paxton and its related entities had a reputation for disregarding environmental laws and regulations.

g. Paxton appealed this decision under the Administrative Review Act, Ill. Review Act, Ill. Rev. stat. ch. 110 Sec. 3-101 et seq. The appeal was added to Paxton's Complaint as Count IV.

i. In the same order, Judge Murray reversed the ZBA's decision and ordered the ZBA to grant Paxton the variance.

j. The City appealed the latter part of the order, which related only to Count IV of the Complaint.

k. The Appellate Court reversed Judge Murray's order in regard to Count IV stating the Circuit Court did not have jurisdiction to decide the Administrative Review action because protesters at the ZBA hearing had not been served with notice of the Administrative Review action.

l. The Appellate Court's decision was appealed to the Illinois Supreme Court and eventually the United States Supreme Court which denied certiorari in October of 1987.

m. Paxton filed a second application for a special use variance with the ZBA on September 12, 1987. On February 8, 1984, however, the City Council had passed an ordinance declaring a moratorium on the issuance of new permits. Consequently, the ZBA refused to docket the second application. Paxton sought administrative review of that decision.

n. In the meantime, Paxton was served with a citation by the City on October 16, 1987 for not having a valid sanitary landfill permit. That matter was consolidated with the Administrative Review action.

o. On October 21, 1988, Plaintiff City of Chicago, filed a complaint to enjoin permanently Defendant, Paxton, from operating without a City of Chicago sanitary land-

fill permit and to fine Defendants $300.00 per day commencing October 16, 1987, for each day defendants operate without a permit.

p. Defendants filed an answer to Plaintiff's complaint, October 31, 1988.

q. Presently, Defendants, have requested leave to file a Corrected Third Amended Answer and Affirmative Defenses numbered 1, 4 and 11 alleging substantive due process violations, equal protection violations and state pre-emption.

r. Plaintiff argues that Defendants have failed to state defenses regarding the aforementioned constitutional claims and pre-emption issue.

DISCUSSION

Section 2-603 of the Illinois Code of Civil Procedure states that pleadings shall contain a plain and concise statement of the cause of action, counterclaim, defense or reply. Pleadings shall be liberally construed with a view to doing substantial justice between the parties. Further, section 2-612 provides that no pleading is bad in substance if it reasonably informs the opposite party of the nature of the claim or defense which he or she must meet.

This court believes that the Defendants have adequately articulated affirmative defenses of due process and of equal protection violations by the City. However, they have failed to allege a state preemptory affirmative defense.

First Affirmative Defense

Defendants allege both violation of substantive due process and equal protection in the First Affirmative Defense.

However, the First Affirmative Defense sufficiently states an equal protection violation only. A due process claim is properly alleged in the Eleventh Affirmative Defense which will be discussed later.

Defendants claim that they were denied equal protection for the following reasons:

a) similarly situated parties were granted variances.

b) moratorium on landfill operations were interpreted differently for other similarly situated parties.

c) similarly situated parties were not prosecuted for violating their variances while defendant was prosecuted for not obtaining a variance.

d) standards applied to Paxton for obtaining a variance were not applied to similarly situated parties.

> "The unlawful administration by state officers of a statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. This may appear on the face of the action taken with respect to a particular class or person, cf. *McFarland v. American Sugar Co.*, 241 U.S. 79, 86-7, or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself, *Yick Wo v. Hopkins*, 118 U.S. 356, presumed, *Tarrance v. Florida*, 188 U.S. 519, 520; there must be a showing of 'clear and intentional discrimination' *Gundling v. Chicago*, 177 U.S. 183, 186 . . ."

Snowden v. Hughes, 321 U.S. 1 (1944).

Defendants, in fact, allege intentional and purposeful discrimination although somewhat maladroitly. Such allega-

tions redundantly appear in the middle and end of the First Affirmative Defense. See 3(C), 3(D) and 3(E). For the sake or clarity, such allegations should appear at the beginning of the defense.

Purposeful discrimination may be shown through the historical background of a decision if it reveals a series of official action taken for discriminatory purposes. Specific sequences of events may also be taken into account if they shed light on the decision-maker's purposes. Departures from the normal procedures are relevant as well as substantive departures. *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 at 267 (1977).

Regarding the first ground of unequal treatment concerning the denial of the variance, Defendants have sufficiently pled discriminatory intent and purpose by alleging events which, if true, could be found to be substantive departures. 3(A) (xi-xx.). Defendants state that the city and ZBA considered hearsay and unsubstantiated evidence alleging Paxton's lack of concern for the environment and that such issues were not considered in connection with the other landfills.

With respect to Defendants' second allegation of unequal treatment concerning the enforcement of the moratorium, Defendants have also alleged purposeful discrimination based on procedural departures. In 3(B) (iv.-vii.), Defendants allege that the city embraced conflicting interpretations of the moratorium:

3(B) iv. For example, the City issued additional permits to Land and Lakes and Waste Management under the theory that permitting either a vertical expansion or an improvement of a pre-existing landfill did not require a "new permit" within the meaning of the moratorium.

v. The ZBA and City then proceeded to deny a variance to defendants on the exact opposite theory, that permitting vertical expansion of a pre-existing landfill requires a "new permit" and is thus banned by the moratorium.

vi. For example, on September 12, 1987, Defendants filed with the ZBA a new application for a special use variance to (i) allow vertical expansion of Paxton I, a pre-existing landfill, from its present height of eight feet above City datum to fifty feet above City datum, and (ii) retroactively allow the vertical expansion and preparation for closure of Paxton II, also a pre-existing landfill.

vii. The ZBA refused to even docket Paxton's new application on a theory, discriminatorily applied to Paxton alone, that permitting a vertical expansion of the pre-existing landfill requires a "new permit" and is thus banned by the moratorium.

With respect to the third allegation of unequal treatment concerning arbitrary prosecution, Defendants have alleged sufficient substantive departures to properly state an equal protection violation. Defendants alleged in 3 (C) (ii.-v.) that standards and burdens applied to them for variances were not applied to similarly situated parties:

ii. In 1987, the City filed this action against defendants for operating a landfill without a formal permit (which Paxton did not have because the ZBA had unconstitutionally denied Paxton a variance before the moratorium).

iii. Land and Lakes has never returned to the ZBA as required in its October 1982 variance approval, which stated: "the applicant's use of the property will be reviewed by this Board in October of 1985."

iv. On information and belief, neither the City nor the ZBA has never taken any steps to enforce this provision

in the ZBA's 1982 variance approval for the Land and Lakes site.

v. Thus, in conformance with the developing pattern of consistent discrimination against Paxton alone, the City and ZBA have never taken any action against Land and Lakes even though Land and Lakes never returned to the ZBA for the review ordered.

Regarding the fourth ground for denial of equal protection, relating to the application of stricter standards, Defendants have alleged substantive departures from the City's and ZBA's normative stance. An affirmative defense has been sufficiently stated by examining 3(D) (ix.-xiv.) which alleges the burdens imposed at the variance hearing:

ix. At the conclusion of the 1989 hearing, the ZBA informed Defendants for the first time, and contrary to law that Paxton must meet new and virtually impossible standards, with proof, "pretty close to beyond a reasonable doubt," in order to obtain a variance for operation of a landfill.

x. On information and belief, the ZBA has never imposed such a burden of proof on any other party seeking a variance of any type.

xi. The ZBA has never applied such a high burden on other similarly situated parties such as Waste Management and Land and Lakes.

xii. There is no reasonable relationship between any legitimate governmental interest and the ZBA's classification resulting in higher standards of proof for Paxton alone.

xiii. Without Paxton's consent, the City had the entire 1989 ZBA hearings televised throughout the city in an attempt to arouse public opinion against Paxton. On information and belief, this televising of the entire ZBA hearings is unprecedented.

xiv. The ZBA denied plaintiff's 1989 application for a variance on unconstitutional grounds including, but not limited to:

(a) the consideration of technical data beyond the purview of the ZBA;

(b) failing to consider the admittedly exemplary operation of the site by Paxton;

(c) imposing upon Plaintiffs the burden of proving that the design was adequate and proving that the ultimate cover would be sufficient;

(d) imposing upon Plaintiffs stricter standards for cover than were imposed upon Paxton's competitors;

(e) denying Plaintiffs' application because of design standards that are not specified under City ordinances or regulations;

(f) basing its decision on an "accepted fact" that is not part of the standards for a variance;

(g) taking into account height limits and alleged height violations that are not part of the requirements for a zoning variance;

(h) alleging a need to eliminate landfills even though the City has not enforced zoning requirements in regard to other presently operating landfills and has not developed waste disposal alternatives to landfills since the first sanitary landfill moratorium was passed in 1983;

(i) denying the application because Plaintiffs' application to the IEPA was deemed not filed, even

though an operating permit is not a requirement for a zoning variance; and

(j) failing to make a finding that the site would pose a threat to the public health, safety or welfare.

Defendants have sufficiently pleaded equal protection violations. A pattern of procedural and substantive departures emerges upon reviewing the allegations in 3A, 3B, 3C, and 3D. Disparate treatment coupled with an intent or purpose to discriminate can be extracted from those sections. Therefore, defendants' First Affirmative Defense is satisfactorily alleged.

FOURTH AFFIRMATIVE DEFENSE

Discussion: Article VII, Section 6 of the 1970 Illinois Constitution creates broad home rule powers. It entitles home rule units to exercise powers and perform functions including regulation for the protection of the public health, safety, morals and welfare. (Ill. Const. of 1970, art VII, sec 6(a)). The constitution states that a home rule unit may be limited only by the General Assembly and only if done so specifically by law. The City of Chicago is a home rule unit. Current case law clearly allows the City, as a home rule unit, to exercise local powers, including the zoning of sanitary landfills.

In defendants' Fourth Affirmative Defense, they claim that the state EPA preempts home rule units in regulating the "siting, design and operation of sanitary landfills" to insure that home rule units do not undermine regional interests in violation of the State of Illinois Constitution. The defendant further claims the city may only consider local concerns such as "the potential conversion of the site from one use to another . . . the odor, noise . . . and so on". This quote has no citation to any author-

ity. Furthermore, it does not reflect the state of the law today. Before 1979, many of the Illinois Constitutional cases were deferring to the state to preempt local government. However, beginning with *Cook County v. John Sexton Contractors Co.*, 75 Ill. 2d 494, 389 N.E.2d 553, *aff'd*, 86 Ill. App. 3d 673, 408 N.E. 2d 236 (1979), the courts have repeatedly given precedent to home rule units authority to regulate zoning issues such as garbage disposal facilities, landfills and other public welfare and local affairs.

In *Sexton*, the county brought a suit to enjoin Sexton from further developing and operating its landfill until it complied with the amended county's zoning laws. Since Sexton had already received a permit from the Illinois EPA, Sexton counterclaimed to stop the county from subjecting its landfill to the zoning laws. The court held there was no preemption by the state. The court determined that the zoning of sanitary landfills was a local concern and therefore it is subject to the home rule powers.

In *Cosmopolitan National Bank v. County of Cook*, 103 Ill. 2d 302, 469 N.E. 2d 183 (1984), the court explained that the EPA may regulate a landfill, however, the choice of site is up to the home rule unit's zoning. The court distinguished previous cases which had allowed preemption on the ground that those cases were *not* dealing with home rule units. The court again in *Waste Management v. Ill. Pollution Control*, 160 Ill. App. 3d 434, 513 N.E.2d 592 (1987) found that the legislative intent was to give local authorities the power to determine site location. In *Beverely Bank v. Cook County*, 157 Ill. App. 3d 601, 510 N.E.2d 941 (1987), the court again acknowledged that state law does not preempt a home rule unit's zoning authority with respect to sanitary landfills. The court explained that although there is concurrent jurisdiction over sanitary landfills under the Surface-Mined Land Conser-

vation and Reclamation Act, the county was not estopped from asserting its zoning ordinance.

The city of Chicago is a home rule unit and is not preempted by the state on zoning issues pertaining to sanitary landfills. Based on the 1970 Illinois Constitution and recent case law, the defendant's Fourth Affirmative Defense should be stricken as substantially insufficient as a matter of law.

ELEVENTH AFFIRMATIVE DEFENSE

Defendants unduly complicate matters by infusing substantive due process language while alleging equal protection violations in the First Affirmative Defense. See 3(B) (ix.) Notwithstanding the lack of cogency, defendants sufficiently allege a substantive due process claim in the Eleventh Affirmative Defense.

> "The term 'due process of law' is not susceptible of exact or comprehensive definition. (16A C.J.S. Constitutional Law Sec. 567 (1956).) There have evolved, however, certain general guidelines to which we can look for guidance. The due process clause imposes its procedural safeguards to protect certain vital interests-life, liberty, and property. (Lipp v. Board of Education (7th Cir. 1972), 470 F. 2d 802.) Substantive due process has been erected by the Supreme Court as the essential bulwark against arbitrary governmental action. (Schwartz, Constitutional Law, 165 (MacMillan 1972).) Arbitrary action, in the due process sense, means action that is wilful and unreasonable-depending on the will alone and not done according to reason or judgment. (Schwartz.) Arbitrary action is synonymous with unreasonableness and thus due process becomes a test of reasonableness. Schwartz, at 166,"

Ashcraft v. Bd. of Education of Danvill, 83 Ill. App. 3d 938, 940 (1980).

Through realleging paragraphs 1 and 2 of the First Affirmative Defense, Defendants state a series of procedural and substantive norms applied to them that are inconsistent with norms applied to other land sites. Further, defendants in 2(D) state there is no reasonable explanation for the disparity. Defendants have alleged conduct, which, if true, could be found to be arbitrary and capricious behavior with no legitimate governmental interest.

THEREFORE, the court makes the following findings: (1) Defendant's First Affirmative Defense properly alleges a violation of equal protection; (2) Defendant's Fourth Affirmative Defense improperly alleging State pre-emption is insufficient as a matter of law, and leave to file the same is denied; (3) Defendant's Eleventh Affirmative Defense properly alleges a violation of substantive due process.

WHEREFORE, it is ordered that the defendants are granted their motion to file substituted First and Eleventh Affirmative Defenses and denied their motion to file substituted Fourth Affirmative Defense.

Plaintiff, City of Chicago, is granted fourteen (14) days within which to file its response to defendants' affirmative defenses.

This cause is set for pretrial conference in Room 1109 of the Richard J. Daley Center before the judge presiding on July 24, 1989, at 11:30 a.m., at which time the court will consider any requests to extend discovery in light of the within order, determine what other matters, if any, require the court's attention and set the cause for trial on a date certain.

Dated: July 3, 1989 ENTER:

_____

Edward P. Burr,
Circuit Judge

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
MUNICIPAL DIVISION--FIRST DISTRICT

CITY OF CHICAGO, a Municipal Corporation, Plaintiff, v. BERNIE PIOTROWSKI, AMERICAN NATIONAL BANK AND TRUST COMPANY, STEVE MARTELL, PAXTON LANDFILL CORPORATION, and STRYKER INTERNATIONAL INCORPORATION, Defendants.	)	No. CC-499-569 (Consolidated)

REPORT OF PROCEEDINGS taken at the hearing of the above-entitled cause before THE HONORABLE JULIA M. NOWICKI, sitting in Courtroom 1109, Daley Center, Chicago, Illinois, on the 8th day of November, A.D. 1989, at about the hour of 9:30 o'clock, A.M.

APPEARANCES:

MR. KELLY WELSH,
Corporation Counsel, City of Chicago,
BY: MR. HENRY L. HENDERSON,
Assistant Corporation Counsel
Litigation Division,

on behalf of the City of Chicago;

Therefore, no prior order will be modified in that regard.

The second and more important issue is the issue regarding matters alleged in the 1st and 11th affirmative defenses.

In summary form, the Defendants allege three grounds contained in those defenses:

First, they allege that the denial of the issuance of a permit constitutes discriminatory administration of the ordinance.

The City responds in summary that this allegation by the Defendants is covered by the Poulos versus New Hampshire case. In that case it was held that the denial of the Defendants' First Amendment rights was not a defense to the non issuance of the permit.

The Defendants herein, their claim of discrimination is one of a denial of due process and equal protection, that is, the Fifth and Fourteenth Amendments.

My conclusion is that there is no basis in the Poulos case or any other case that the Fifth and Fourteenth Amendments should fare any better than the First Amendment.

Consequently, I agree with the City that the Poulos case covers the facts and argument alleged here and the affirmative defenses are stricken on that basis.

Second, the Defendants argue that their ability to obtain a permit has been met by a novel procedural bar and with interminable delay and frustration.

They cite "Walker versus the City of Birmingham", a Supreme Court case, to support their contention. The City argues that a prerequisite to both arguments is that the

Defendants be in the process of a direct attack on non issuance of a permit in a civil tribunal.

In other words, any procedural bar or delay must present itself in the civil tribunal, in the course of a direct attack, not at the level of the body whose authority it is to issue the permits, here the city.

In this case then, the civil tribunal would be the administrative review taking place in the trial court right now, or some hypothetical case commenced by, for example, a writ of mandamus.

I agree with the City that the Defendants have not demonstrated any novel procedural bar presented by a tribunal which impedes their right to present their claims.

The Defendants' claims of novel procedural bar and delay and frustration are with the Z.B.A. and the City only, not with the civil tribunal. Therefore, the 1st and 11th affirmative defenses are stricken on these grounds, as well.

Let me add as a postscript—let me say that I don't know whether a writ of mandamus would've resulted in a novel bar or delay. It simply hasn't been alleged, because the action has not been instituted.

Consequently, my ruling is as follows on the Motion of Summary Judgment as it is being construed as a 2-615 motion, the motion is granted, as to the 1st and 11th affirmative defenses. The result of this is there are no remaining affirmative defenses. Just so there is no confusion to what I just said.

I'll just say one more time, that what I have just done constitutes a reversal of Judge Burr's ruling on the 2-615 motion, if in fact, Judge Burr did rule on that. Clearly, that's what I have done.

The second decision is to rule on the City's Motion for Summary Judgment. This is of course a very straightforward motion. Either the Defendants have a permit, or they do not. It is conceded by the Defendants that they do not have a permit, therefore, the Motion for Summary Judgment is granted.

An injunction is entered enjoining the Defendants from further use of the property as it is being used at the present time, until a permit is obtained.

Additional comment: I am staying the effectiveness of this ruling, granting the Motion for Summary Judgment, to at least one week from today. I think it is enough time for the Defendants to file a Notice of Appeal and a written motion for a stay. The Appellate Court Rules allow for a stay on a discretionary basis in this situation.

I would like to set it for next week. If I received a notice of appeal and a very short motion for a stay, I would like to state right now, at least some of the facts I would be considering if I were to grant the stay:

Number One is the fact that there is no factual basis for any irreparable harm set out in any complaint. That is important.

Number Two, the decision on the administrative review of the decision of the Z.B.A. is currently being reviewed by Judge Reynolds in Chancery Court.

Number Three, I can see that Judge Burr and I disagree as to the conclusion reached from the Poulos case and the Walker case, and I think he is reasonable and I think I am reasonable, so we have two reasonable minds which disagree on a judgment such as this.

The financial consequences—I think they are very serious matters alleged in the 1st and 11th amendments, and

if they ever get a chance to be proven, I think that fact is something that should be taken into account on a request for a stay in the appeal.

I just want to say one thing:

> If there's any question, I don't want my ruling on a motion for summary judgment in any way to diminish in anyone's mind what I feel to be the gravity of the allegations of the 1st and 11th affirmative defenses. I don't know if they are true, but if they are true, they should be heard as soon as possible.

Any problems on this case next week? Motion for a stay?

MR. McANDREWS: No, there's no problem.

THE COURT: I already set it for 9:30.

There are four matters I would be considering, and certainly, if there are other matters to be brought to my attention.

And as to the City—

MR. HENDERSON: On the four matters, the second one had to do with the administrative review action before Judge Reynolds.

What aspect of that are you interested in? Is it that it is still proceeding, or—?

THE COURT: Well, there's something pending, which would very likely open up a door; and if the court is participating, it's something that I should be aware of and take into account.

MR. McANDREWS: I take it, Your Honor, since we have similar allegations in the administrative review, you would like to have those pointed out to you.

THE COURT: I know enough about the case, about the pleadings, and your next step—I have listed four things. They all seem to be going in favor of the Defendants.

I'm suggesting to the City, if there's something you want to bring to my attention, that you have a week—9:30 next Wednesday.

Of course, the prerequisite is a notice of appeal, and I do think this requires a written motion for a stay.

MR. McANDREWS: Thank you, Judge; at least a day before, delivered to your office.

THE COURT: If you want to, I can probably review the matters while you argue; but it's going to have to be next Wednesday.

MR. HENDERSON: Shall we write the order now?

THE COURT: Why don't you bring it in next week? I just need the 2-615 granted, motion for summary judgment granted.

* * * *

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
MUNICIPAL DIVISION—FIRST DISTRICT

CITY OF CHICAGO, a Municipal Corporation, Plaintiff, v. BERNIE PIOTROWSKI, AMERICAN NATIONAL BANK AND TRUST COMPANY, STEVE MARTELL, PAXTON LANDFILL CORPORATION, and STRYKER INTERNATIONAL INCORPORATION, Defendants.	)	No. CC-499-569

REPORT OF PROCEEDINGS taken at the hearing of the above-entitled cause before the HONORABLE JULIA M. NOWICKI, sitting in Courtroom 1109, Daley Center, Chicago, Illinois, on the 18th day of October, A.D. 1989, at about the hour of 2:00 o'clock, P.M.

APPEARANCES:

MR. KELLY WELSH,
Corporation Counsel, City of Chicago,
BY: MR. HENRY L. HENDERSON and
MS. NANCY VAN ALLEN,
Assistant Corporation Counsel
on behalf of the City of Chicago;

THE COURT: (Continuing) My impression of the argument is that you really want me to reconsider and overrule Judge Burr, or I would have to do that, because of your Motion for Summary Judgment. He has, somehow, incorrectly understood the law.

MS. VAN ALLEN: I—correct me if I'm wrong—I don't think—

MR. HENDERSON: There have been a number of affirmative defenses stricken, particularly an attempt by the protection violation. This was on the Motion for Leave to file a Third Amendment from the affirmative defenses the City filed in opposition to the motion, which focused upon whether equal argument was alleged, or a due process argument was alleged.

They're not sufficiently alleged; they rely on matters which were decided by other courts, or were improperly before this court, or the conditions and elements such as discrimination against a class, were not proper.

So our claim was what they set forth as a due process and protection, and did not raise the issue of due process, or either of protection.

He said, "You do have the elements there." He did not say, "You have the elements and they're adequate as a defense against which you are alleging."

He said they have set forth the elements that constitute a due process and equal protection claim.

The issue of whether that is an inadequate defense as a matter of law was not addressed in the Opinion.

MR. McANDREWS: I've got Judge Burr's transcript of April 12, 1989. It talks about what the City's position is and what the E.P.O. ruling would be, and what evi-

dence he would have to hear if he allows the affirmative defense.

I think it's rather succinct, where he says, "You take the position of not withstanding, which is not a defense. I read your memorandum, and I don't agree with it."

Then he goes on and says, "I have to hear whatever evidence, if they're ever able to plead."

THE COURT: It might be good for me to read the transcript, but, ultimately, I have to look at the written order. On Page 10, it says, quote, "The defendants have sufficiently pleaded equal protection violation."

I don't know what more a judge can say, indicating that it has been well pled.

Mr. HENDERSON: The fact that their pleading is not the determination that it adds up to an adequate defense. It says "an element."

THE COURT: —"equal protection—"

You don't think they should?

MR. HENDERSON: I don't think it's an adequate protection.

THE COURT: No matter how well pled, you don't think they should raise it?

MR. HENDERSON: No.

THE COURT: The only way I would, would be to change Judge Burr's order.

(To Mr. McAndrews) Would you like to respond?

STATE OF ILLINOIS
COUNTY OF COOK–SS

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
FIRST DISTRICT–MUNICIPAL DIVISION

CITY OF CHICAGO, a municipal corporation, Plaintiff,	)	
v.	)	No. CC-499-569 (As consolidated)
BERNIE PIOTROWSKI, et al., Defendants,	)	
and	)	
PAXTON LANDFILL CORPORATION, Plaintiff,	)	
v.	)	No. 88 CH 2376
ZONING BOARD OF APPEALS, DEPARTMENT OF CONSUMER SERVICES, and the CITY OF CHICAGO, a municipal corporation, Defendants.	)	

REPORT OF PROCEEDINGS had in the above-entitled matter before the HONORABLE JULIA M. NOWICKI, Judge of said court, on Wednesday, November 15, 1989, commencing at the hour of 9:15 a.m.

(Enter Ms. Springs)

MR. McANDREWS: No, your Honor.

In fact, when they first brought the action against us, there was no request for fines, because we questioned that and also noted that there was no claim of irreparable injury or emergency.

I am not certain, but the request for fines was added later. And we have not addressed that issue at all.

THE COURT: All right. Then let me say at this point—let me make the 304(a) findings that based on what has gone on in this case thus far, which is really on the substantive matters of the case, that there is no just reason for delay of enforcement of the ruling on the motion for summary judgement and the ruling on the 216 motion to dismiss. So that will have to be put somewhere in this order today.

So then we are at least in an appeals posture.

All right. I was wondering—let me make my findings first as to whether or not there should be a stay in this case.

I think I set out—I was pretty clear last time we were here the type of matters I would be considering, and I think both parties addressed those issues in their written motions here today. And my findings are as follows.

I think that the—number one, that the economic loss to both the defendants and the employees of the defendants is self-evident.

Number two, I think that by law, the City is relieved of its obligation to plead a factual basis for irreparable harm; thus there is no such showing in the record.

Number three, I think we have a good faith difference of opinion between two judges. We have seen basically the same briefs and arguments.

Number four, we certainly have the possibility of the defendants receiving partial relief when the circuit court by way of Judge Reynolds rules on the administrative review action.

And lastly, we have some rather—what I will call devastating or very important allegations set out in the first and eleventh affirmative defenses.

I think all of those findings made by me fulfill the legal requirements of 305(b), which is the discretionary section of the appeals rules regarding stays on injunctions.

So in that—so in light of that, the stay will be granted.

I would like to take up a bond now. I am wondering whether or not—if anyone has computed what the total amounts of fines would be.

MR. HENDERSON: Your Honor, if we—yes.

THE COURT: Someone did. Looks like it's even typewritten.

MR. HENDERSON: Yes.

If we take from the day where their permit stopped operating, which is February 25th, 1984, and add three hundred days—three hundred dollars for the first day and a thousand dollars for each day after that, it comes up to 2,090 days of operation without a permit, which comes to a total of $2,089,300.

THE COURT: Okay.

MR. HENDERSON: If we count from the day of the citation, which is October 16th, * * *

(2)

Supreme Court, U.S.
FILED
MAR 19 1992
OFFICE OF THE CLERK

No. 91-1457

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BERNIE PIOTROWSKI,
AMERICAN NATIONAL BANK AND TRUST COMPANY,
STEVE MARTELL, PAXTON LANDFILL CORPORATION,
and STRYKER INTERNATIONAL INCORPORATED,
Petitioners,

v.

CITY OF CHICAGO, a municipal corporation,
Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois

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BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the operator of a permitless landfill can assert as a defense in an action to enjoin further permitless operation that its application for a permit was unconstitutionally denied when it failed to exhaust its administrative remedies concerning that denial.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1457

BERNIE PIOTROWSKI,
AMERICAN NATIONAL BANK AND TRUST COMPANY,
STEVE MARTELL, PAXTON LANDFILL CORPORATION,
and STRYKER INTERNATIONAL INCORPORATED,
Petitioners,

v.

CITY OF CHICAGO, a municipal corporation,
Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois

---

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Illinois Appellate Court is reported at 215 Ill. App. 3d 829, 576 N.E.2d 64 (1991), and is reprinted at Pet. App. A. 1-A. 9.

The oral ruling of the Circuit Court of Cook County, Illinois, has not been reported. It is reprinted at Pet. App. A. 31-A. 42.

STATEMENT

Since 1984, Paxton Landfill Corporation has operated a landfill in the City of Chicago without a permit. Pet. App. A. 1-A. 5. As the appellate court noted in its opinion, this violates no fewer than three ordinances of the

City of Chicago. Pet. App. A. 8. Paxton has been unable to obtain the requisite permit because the City's Zoning Board of Appeals has twice rejected its application for a special use variance, first in 1984 and later in 1989, that would allow the issuance of a permit for Paxton's site. Pet. App. A. 2-A. 4. Paxton has continued to operate while employing litigation as a delaying tactic. In its first case, it sought administrative review of the Zoning Board of Appeals' 1984 decision, only to have the action dismissed because of its failure to comply with the Illinois Administrative Review Act. See *American National Bank & Trust Co. v. City of Chicago*, 132 Ill. App. 3d 570, 478 N.E. 2d 1 (1985). Paxton then initiated federal litigation, claiming that the Illinois courts' refusal to consider its administrative review action on its merits violated the United States Constitution. That lawsuit was held to be barred by the prior state litigation. See *American National Bank & Trust Co. v. City of Chicago*, 826 F.2d 1547 (7th Cir.), cert. denied, 484 U.S. 977 (1987). At that point, the City brought this case against petitioners in order to enjoin further illegal operations at the Paxton Landfill.

Paxton responded to the City's lawsuit in two ways. First, it made its second application for a special use variance. After that application was denied, Paxton challenged the denial by filing another action seeking administrative review, which remains pending in the Circuit Court of Cook County, Illinois. Pet. App. A. 3-A. 4. Second, Paxton forwarded as affirmative defenses in this enforcement action that the City's refusal to grant it the variance deprived it of due process and equal protection. The circuit court struck those affirmative defenses, granted summary judgment, and entered an injunction prohibiting further operation of the landfill. The appellate court affirmed, relying on the settled principle that Paxton could challenge the denial of its application only through the administrative process, and not through a collateral attack. The Supreme Court of Illinois subse-

quently denied Paxton's petition for leave to appeal to that court.

ARGUMENT

PAXTON'S FAILURE TO EXHAUST ITS ADMINISTRATIVE REMEDIES PRECLUDES IT FROM SUCCESSFULLY DEFENDING AN ACTION SEEKING TO ENJOIN ITS UNLAWFUL OPERATION OF A PERMITLESS LANDFILL.

Petitioners now challenge neither the ordinances requiring Paxton to obtain a permit before it can lawfully operate a landfill in the City of Chicago, nor the finding of the lower courts that Paxton operates its landfill without the requisite permit. Rather, petitioners contend that Paxton need not obtain the required permit because the City of Chicago unconstitutionally denied its applications. Unfortunately for Paxton, it has not availed itself of the mechanism provided by Illinois law for challenging the denial of such an application—a petition for administrative review from the denial decision itself. Because Paxton has failed to exhaust its available administrative remedies under state law, there is a state-law procedural bar to its attack on the denials, and hence no federal question presented by this petition. Nor is the United States Constitution offended by the application of this straightforward rule of state law to Paxton's case.

1. The jurisdiction of this Court, of course, is limited to the review of questions of federal law. See 28 U.S.C. § 1257. Accordingly, when the decision of a state court rests on an adequate and independent state-law ground, this Court lacks jurisdiction over the case. *E.g.*, *Michigan v. Long*, 463 U.S. 1032, 1038-41 (1983). Even a cursory review of the opinion of the Illinois Appellate Court in this case makes clear that it decided no question of federal law. The appellate court simply followed the settled rule of Illinois law that the only appropriate venue for challenging the administrative denial of an application is through the administrative review process, and

not through a collateral attack on that denial in separate litigation. Paxton's original application was denied in 1984, and it failed to perfect its administrative review action. That being the case, it had no continued right to operate a permitless landfill. In 1989, Paxton filed a second application, and again sought administrative review of that denial, but thus far it has failed to obtain relief. Paxton may not use federal constitutional grounds as a substitute for complying with the rules found in Illinois law concerning administrative review.

Petitioners contend that the appellate court's refusal to reach their federal claims is unconstitutional in itself. That is simply wrong. In fact, this Court has squarely addressed this precise question. In *Poulos v. New Hampshire*, 345 U.S. 395 (1953), the Court upheld the conviction of a defendant charged with conducting an outdoor meeting without obtaining a required license in the face of his claim that an application for a license had been arbitrarily and unconstitutionally denied. The Court held that because Poulos had not complied with the available procedures for applying for licenses and obtaining review of denials, he was barred from challenging that denial on federal constitutional grounds.

Because Paxton's failure to exhaust its administrative remedies constitutes an independent and adequate state-law ground for a decision, and indeed a ground which this Court has already held sufficient to insulate the denial of an application from federal constitutional challenge, this petition is insubstantial. While petitioners seem to claim that the state courts have somehow prevented them from raising a federal claim, there is no support for that assertion. In 1984, Paxton had a full opportunity to obtain judicial review of the denial of its initial application, but failed to do so. The Seventh Circuit has already held that Paxton's failure to comply with the Illinois Administrative Review Act precluded any subsequent attempt to attack that denial on federal grounds. See *American National Bank & Trust Co. v. City of Chi-*

cago, 826 F.2d 1547 (7th Cir.), cert. denied, 484 U.S. 977 (1987). Having had its opportunity to contest the 1984 denial, Paxton is not entitled to continued permitless operation until it receives a second bite at the apple. None of the decisions on which petitioners rely even remotely addresses the question whether the denial of an application may be collaterally attacked on federal constitutional grounds when the applicant has failed to exhaust available state-law remedies for challenging the denial.

2. Even if the defense of selective prosecution in violation of equal protection and due process were available to petitioners, it would be insufficient. While petitioners argue strenuously that their discriminatory enforcement claim should be heard in this action, nowhere in the petition do petitioners state what that claim is. To state a claim for selective prosecution, petitioners must establish that the decision to prosecute was "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Wayte v. United States*, 470 U.S. 598, 608 (1985) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)). Petitioners never identify what unjustifiable standard they believe was utilized in this case. The petition itself says nothing on the subject. The pleadings attached to the petition identify two other landfills in Chicago that have acquired special use variances, and assert disparate treatment by the Zoning Board of Appeals regarding the issuance and review of special use variances. The pleadings also concede, however, that those landfills have permits. That eliminates any possibility for a meritorious claim of selective prosecution. Petitioners do not claim that the City of Chicago has failed to prosecute other permitless landfills; and indeed only Paxton is operating without a permit. Because no other putative defendant is similarly situated to Paxton, there can be no basis for a claim of selective prosecution. Petitioners were prosecuted because they run a permitless landfill—that is not an arbitrary or discriminatory basis for prosecution. The only

relevant claim petitioners do make is that Paxton should have received the type of variance granted to the two other identified landfills. That claim, as the appellate court concluded, is not a claim involving selective prosecution, but rather a claim of disparate treatment by an administrative agency, the Zoning Board of Appeals, and should be heard in an administrative review action challenging the decision of that agency, and not in this case.

3. Petitioners have accordingly failed to demonstrate any justification for this Court's review. They have not demonstrated the existence of any conflict in the lower courts over whether an exhaustion rule such as that used in Illinois violates any federal rights, that the question presented by this petition is of general importance, or even that the exhaustion rule utilized in Illinois did not afford petitioners an adequate opportunity to raise their federal claims. There is accordingly no basis for review under this Court's rules.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

KELLY R. WELSH
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March 19, 1992